

No. 14107.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK WEAVER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on July 29, 1953, under Section 2421 of Title 18, United States Code.

On August 17, 1953, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on September 8, 1953.

On September 8, 1953, appellant was tried in the United States District Court for the Southern District of California before the Honorable Peirson M. Hall, sitting without a jury, and on September 9, 1953 was found guilty as charged in the Indictment.

On September 14, 1953, appellant was sentenced to pay a fine in the sum of \$5,000.00 and imprisonment for a

period of five years, and judgment was so entered. Appellant appeals from this judgment.

The District Court has jurisdiction of this cause of action under Section 2421 of Title 18, United States Code, and Section 3231 of Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 8, United States Code.

II.

STATUTES INVOLVED.

The Indictment in this case was brought under Section 2421 of Title 18, United States Code.

The Indictment charges a violation of Section 2421 of Title 18, United States Code, which provides in pertinent part:

“Whoever knowingly transports in interstate or foreign commerce, . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral practice; or

“Whoever knowingly procures or obtains any ticket or tickets, or any other form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, . . . in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, . . . whereby any such woman or girl shall be transported in interstate or foreign commerce, . . .

“Shall be fined not more than \$5,000, or imprisoned not more than five years, or both.”

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

“On or about December 15, 1952, defendant FRANK WEAVER did knowingly transport and cause to be transported, and did aid and assist in obtaining transportation for, and in transporting, a woman, namely: Dolores June Penfield, in interstate commerce, namely: from Minneapolis, Minnesota to Los Angeles County, California, within the Central Division of the Southern District of California, for prostitution, debauchery, and other immoral purposes.”

On August 17, 1953, the appellant appeared for arraignment and plea, represented by Earl C. Broady, Esq., before the Honorable Peirson M. Hall, United States District Judge, and entered a plea of not guilty to the offense charged in the Indictment. On September 8, 1953, the case was called for trial before the Honorable Peirson M. Hall, United States District Judge, sitting without a jury, and on September 9, 1953, appellant was found guilty as charged in the Indictment.

On September 14, 1953, the appellant was sentenced to pay a fine in the sum of \$5,000.00 and be imprisoned for a period of five years in a penitentiary.

Appellant assigns as error the judgment of conviction on the following grounds:

A—The Court erred in permitting the impeachment of the Government's witness, in the absence of a foundation showing surprise, and the Court erred in holding that there was surprise.

B—The Court erred in admitting the hearsay diary of the prosecutrix into evidence “for the limited purpose of testing the verity of this witness.”

C—The Court erred in permitting the reading by the prosecutor of documents purportedly written by the prosecutrix and permitting the reading of extrajudicial statements of the prosecutrix allegedly made to agents of the Federal Bureau of Investigation.

D—The Court erred in inquiring into the truthfulness of hearsay statements which were admitted by the Court to “test the verity of the witness” and for impeachment purposes only.

E—The evidence is insufficient to sustain the judgment of conviction in that two necessary elements, to wit: transportation and intent and purpose, as required by statute, were not proved.

F—The Court erred in denying defendant’s Motion for Judgment of Acquittal.

IV.

STATEMENT OF FACTS.

Dolores June Penfield met the appellant, Frank Weaver, in 1949. Shortly thereafter she went to work for Weaver in his malt shop. She also went to live with Weaver and they assumed a meretricious relationship. Penfield, during this time, was also known as Lola Weaver.

During the time Penfield was living with Weaver, she engaged in activities of prostitution in Los Angeles. She gave money to Weaver. [Tr. pp. 17-18.]¹ Weaver on occasion posted bond for Penfield in arrests for prostitution. [Tr. p. 19.]

¹“Tr.” refers to “Reporter’s Transcript of Proceedings.”

During October, 1952, Penfield, after a misunderstanding with Weaver, left Los Angeles in company of one Jerry Frazier and one Harry Seymour. [Tr. pp. 49, 72.] Penfield, Frazier and Seymour went to Minneapolis, Minnesota. Frazier and Seymour were subsequently tried in Minneapolis for transporting Penfield in interstate commerce for the purpose of prostitution. [Tr. pp. 134, 148.] Penfield was interviewed by agents of the Federal Bureau of Investigation in Minneapolis, Minnesota. [Tr. p. 131.]

While in Minneapolis, Penfield received a telephone call from Weaver asking her to return to Los Angeles to work for him. [Tr. pp. 90-92.] Subsequently, Weaver went to Minneapolis and he and Penfield resided there together until their return together to Los Angeles. [Tr. pp. 95-96.]

During Weaver's stay in Minneapolis, he resided at the Frederick Hotel. [Tr. pp. 95-96.] He had several conversations concerning prostitution activities in Los Angeles and his participation therein. [Tr. pp. 97-98, 108, 110-113.]

After Weaver's and Penfield's return from Minneapolis to Los Angeles, Penfield again engaged in prostitution activities in Los Angeles. [Tr. pp. 115-120, 124-125.]

On May 25, 1953, Penfield was, at her own instigation, interviewed by Agents of the Federal Bureau of Investigation in connection with information concerning a possible violation of the White Slave Traffic Act. [Tr. pp. 234, 256.] Again, on July 29, 1953, Penfield was interviewed by Agents of the Federal Bureau of Investigation. Each time she made substantially the same statements

regarding her transportation from Minneapolis, Minnesota, to Los Angeles, California, by Weaver.

On July 31, 1953, Weaver was arrested by Agents of the Federal Bureau of Investigation. Penfield was with Weaver at the time of his arrest.

V.

ARGUMENT.

A. The Trial Judge Properly Allowed the Government to Ask Foundation Questions for the Impeachment of Its Own Witness.

The questions raised upon the appeal of the present case are threefold. They resolve themselves from a situation where the Government, discerning the recalcitrance of a witness, seeks to go forward with the impeachment of that witness after a claim of "surprise" or at least an ascertainment by the Court that the Government did not reasonably anticipate the recalcitrance of the witness. The questions are (1) whether the Court properly permitted cross-examination of the witness, (2) whether prior inconsistent or contradictory statements by a hostile witness were properly admitted, and (3) whether such prior statements were properly limited to the question of the credibility of the witness or were in fact used as a device to present otherwise inadmissible evidence. It should be noted from the outset that once the hostility of a witness has become apparent, his credibility may be attacked by the calling party either through (1) cross-examination, (2) introduction of prior inconsistent or contradictory statements, or (3) through the testimony of other witnesses.

The decided cases prescribe no uniform procedure for dealing with hostile witnesses. In any case, the discretion of the trial court controls if not patently abused.

St. Clair v. United States, 154 U. S. 134, 38 L. Ed. 936, 14 S. Ct. 1002;

Young v. United States, 97 F. 2d 200.

That a calling party may impeach his own witness by cross-examination in the event of unexpected hostility is well settled.

United States v. Budd, 144 U. S. 154.

The extent of cross-examination of a witness whose hostility appears toward the calling party rests within the discretion of the Court but must be limited solely to his credibility on the stand rather than to encompass otherwise inadmissible evidence damaging to the opposing party which may have been contained in any prior statements made by such hostile witness. *Young v. United States*, *supra*; *United States v. Block*, 88 F. 2d 618. Compare: *Pastrano v. United States*, 127 F. 2d 43; *Schonfeld v. United States*, 277 Fed. 934; *United States v. Graham*, 102 F. 2d 436, where detailed expositions appear of the extent of cross-examination permitted by the trial court and sanctioned by appellate courts.

The language contained in *Walker v. United States*, 104 F. 2d 465, well states the rationale of the rules relating to examination of hostile witnesses as follows:

“The appellants also objected that the government was allowed to impeach certain of its witnesses by cross-examining them with respect to certain written statements contrary to their testimony which they had made before trial. The rule to be applied in dealing with a recalcitrant witness is thus stated in

DiCarlo v. United States, 2 Cir., 6 F. 2d 364, 368: 'The latitude to be allowed in the examination of a witness, who has been called and proves recalcitrant, is wholly within the discretion of the trial judge. *Nothing is more unfair than to confine a party under such circumstances to neutral questions.* Not only may the questions extend to cross-examination, but, if necessary to bring the truth, it is entirely proper to inquire of such a witness whether he has not made contradictory statements at other times. He is present before the jury, and they may gather the truth from his whole conduct and bearing, even if it be in respect of contradictory answers he may have made at other times.' See, also, Big Vein Pocahontas Co. v. Repass, 4 Cir., 238 F. 332; Curtis v. United States, 10 Cir., 67 F. 2d 943, 946; London Guaranty & Accident Co. v. Woelfle, 8 Cir., 83 F. 2d 325." (Emphasis ours.)

In the present case, the trial judge heard the testimony. He observed the manner in which Penfield, the Government witness, testified. He was aware of the recalcitrance of Penfield as a Government witness. This becomes obvious from the record. At one time early in Penfield's testimony, it was necessary for the Court to admonish her severely. [Tr. pp. 15-16.] Therefore, it is submitted that the Court properly allowed the Government to ask impeaching questions of its own witness by cross-examination.

B. The Court Properly Admitted the Diary of Penfield as Part of the Impeachment of Her Testimony.

The only question raised here is whether or not a diary kept by Penfield could be used as impeachment of her testimony.

Penfield had told Agents of the Federal Bureau of Investigation that the entries in the diary were true and that they were an account of her relationship with the appellant Weaver. In her testimony at the trial, she denied the truth of those statements and characterized them as a "figment of my imagination." Certainly then her testimony on the stand was inconsistent and contrary to her prior statements given to Agents of the Federal Bureau of Investigation. It is submitted that the diary was properly admitted and limited to impeachment of Penfield's testimony.

C. The Court Properly Admitted Documents Written by Penfield and Statements Made to Agents of the Federal Bureau of Investigation as Impeachment of Her Testimony.

No new question is raised by appellant's Specification of Error in regard to documents written by Penfield and statements made to the Federal Bureau of Investigation. It is therefore respectfully requested that the argument heretofore made under paragraphs A and B of this Argument be made applicable also to this Specification of Error.

D. There Was No Error in the Inquiry Into the Truthfulness of Statements That Penfield Made Prior to Trial to Test Her Veracity as a witness.

The Court properly inquired into the truthfulness of statements made by Penfield to Agents of the Federal Bureau of Investigation. By this method of questioning, the witness was given an opportunity to refresh her recollection and to correct her testimony if she were innocently mistaken. The trial judge limited very strictly all of the questions concerning the inconsistency of Penfield's testimony with her prior statements to impeachment only, and it is therefore submitted that the Court did not err in inquiring into the truthfulness of these statements.

E. The Evidence Is Sufficient to Sustain a Judgment of Conviction.

A reading of the Record, especially the testimony of the Government's witnesses, viz.: Margaret B. Smith [Tr. pp. 88-92], Arnold Roston [Tr. pp. 93-99], James Backstrom [Tr. pp. 99-106], Margaret K. Bryant [Tr. pp. 106-113], John Allen Olsen [Tr. pp. 113-122], Robert D. Long [Tr. pp. 122-128], and William George Singer [Tr. pp. 157-161], establishes sufficiently the necessary elements of transportation, intent and purpose.

VI.

CONCLUSION.

The trial court properly allowed the impeachment of the Government's own witness.

The evidence is sufficient to sustain the judgment of conviction.

There was no error in the denial of defendant's Motion for Judgment of Acquittal.

It is therefore respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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